

35 U.S.C. § 103(a).

Claims 1-44 have been rejected under Section 103(a) as being unpatentable as obvious in light of U.S. Patent No. 4,840,808 ("*Lee*") when taken in combination with U.S. Patent No. 5,447,732 ("*Tanimoto*"). The Examiner has maintained that there was a sufficient motivation, based on the level of ordinary skill in the art alone, to make the claimed invention by combining *Lee* and *Tanimoto*. According to the Examiner, it would have been obvious, in light of *Tanimoto*, to change the ingredients and physical state of *Lee*'s preservative compositions comprising magnesium, calcium, zinc, and copper to arrive at the claimed invention. This rejection is improper: neither *Tanimoto* nor the level of ordinary skill in the art provided any motivation to change *Lee* in the manner suggested to yield the claimed invention.

*Lee* discloses that freshly harvested green vegetable color can be preserved and retained in finished pasta and macaroni products produced by the addition to semolina at a high pH of sufficient amounts of cations, alkaline and buffering substances in vegetable puree or reconstituted vegetable powder slurry. According to *Lee*, green vegetable matter is subjected by a dip or spray operation to an alkaline sodium or potassium containing solution wherein the pH is above 7.0. The color of the green vegetable matter is attributed to the presence of chlorophylls. *Lee* describes hydrolysis of methyl and phytol groups to produce deep green color chlorophyllins at a pH of 7.0 or above. The chlorophyllins produced from the hydrolysis of the methyl and phytol groups of chlorophyll are added to alimentary paste to produce darkly colored pasta. In *Lee*, the pH of the pasta must be maintained above 7.0 and the water soluble chlorophyllins added to the alimentary vegetable paste contribute to the stable green coloration of the alimentary vegetable paste and pasta produced therefrom.

In contrast, the instant invention comprises solid and aqueous salt-containing compositions for use in cooking, flavoring food, or preparing a final cooking water composition. The buffers or alkaline metallic salt solutions used in *Lee* are not used to

cook pasta; they are instead used to preserve color and texture in the manufacture of pasta. Further, *Lee* does not disclose the specific cations and cation concentrations used in the claimed invention. The other reference cited by the Examiner, *Tanimoto*, which discloses poly- $\gamma$ - glutamic acid-containing compositions that evidence enhanced mineral absorption, does not teach or suggest solid and aqueous salt-containing compositions for use in cooking, flavoring food, or preparing a final cooking water composition, nor does it provide any motivation to modify *Lee* to provide such compositions.

Compared to the instant invention and each other, *Lee* and *Tanimoto* are disparate as they relate respectively to a particular way to make a food product (pasta) and a food product ingredient (supplement) that enhances mineral absorption upon ingestion. Neither reference discloses solid and aqueous salt-containing compositions used in cooking, flavoring food, or preparing a final cooking water composition.

If the alleged obviousness of a claimed invention is based on a combination of references, there must be a rigorous showing of a clear and particular suggestion, teaching, or motivation to combine the references relied upon. *In Re Dembiczak*, 50 U.S.P.Q.2d 1614 (Fed. Cir. 1999). Such evidence may come from the references themselves, the knowledge of those skilled in the art, or from the nature of the problem to be solved. While this showing may come from the prior art, as filtered through the knowledge of one skilled in the art, *Brown and Williamson Tobacco Corp., Inc. v. Philip Morris Inc.*, 56 U.S.P.Q. 2d 1456 (Fed. Cir. 2000), it is still subject to the rigorous requirement that the combination not be motivated by impermissible hindsight. *In Re Dembiczak, supra*. Further, there must be a particular showing that one of ordinary skill in the art would have believed there was a reasonable likelihood of success that the suggested combination of references would work to yield the claimed invention. *Brown and Williamson Tobacco Corp, supra*. In the present case, Applicants respectfully submit that the Examiner's has not made out a cogent case for the rejection of the present application.

The Examiner has failed to provide a rigorous showing of a clear and particular suggestion, teaching, or motivation to combine *Lee* and *Tanimoto* to yield the solid and aqueous salt-containing compositions of claims 1-44. To the contrary, without any suggestion or motivation in the art, she has taken overlapping cationic ranges in *Lee*'s food ingredient, misinterpreted *Lee* to relate to a method of cooking as opposed to making a food product, and applied *Tanimoto*'s cationic ranges to the misconstrued version of *Lee*. It is improper as a matter of law to select, modify and combine references, in essence to cherry-pick the disclosures, in this manner in the absence of clear evidence supporting the selection, modification, and combination. *In Re Dembiczak, supra*.

There is also no basis for the Examiner to characterize the instant invention as reflecting the mere addition or elimination of well-known food ingredients, or to suggest that the Applicants have only identified selected well known ranges of ingredients that are merely the result of "optimization". This also misapprehends the claimed invention and the law. "[T]he criterion of § 103 is not whether the differences from the prior art are 'simple enhancements' [optimizations], but whether it would have been obvious to make the claimed [invention]." *Continental Can Company USA, Inc. v. Monsanto Co.*, 20 U.S.P.Q.2d 1746 (Fed. Cir. 1991). There is no lower threshold in establishing obviousness for food related inventions; a uniform standard precludes reliance on hindsight in evaluating the patentability of an invention irrespective of complexity. *Panduit Corp. v. Dennison Mfg. Co.*, 1 U.S.P.Q. 2d 1593 (Fed. Cir.), *cert. denied*, 481 U.S. 1052 (1987).

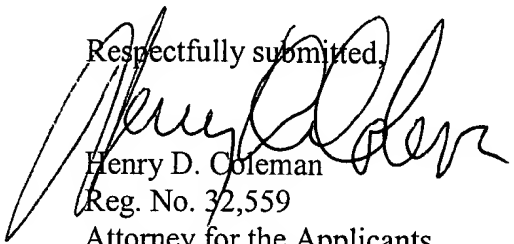
In light of all of the foregoing, it is respectfully maintained that the instant amendments and remarks address all of the grounds for rejection raised by the Examiner. Accordingly, Applicants respectfully maintain that all of the pending claims 1-44 should be passed to issue.

Applicants: Sidoti, et al.  
Application No.: 09/896,970  
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Docket No. B42-001

No amendment is due for the presentation of the instant amendment. Please charge any fee due or credit any overpayment made to deposit account 04-0838.

Respectfully submitted,



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Reg. No. 32,559

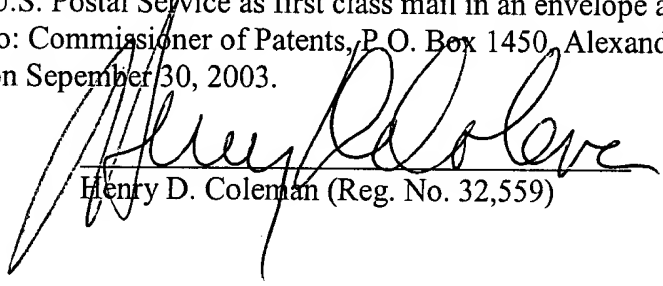
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